

These are the tentative rulings for civil law and motion matters set for Thursday, October 9, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, October 8, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

**NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov).**

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EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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**1. M-CV-0059924      Deutsche Bank vs. Ochsner, David**

Defendant's Motion to Consolidate and/or Stay Unlawful Detainer Proceedings

David Ochsner's Motion to Consolidate and/or Stay Unlawful Detainer Proceedings is denied. As an initial matter, the motion was not served on all parties in both actions as defendant Rachel Tolbert has not been served with the motion. Further, there has been an insufficient showing to warrant consolidation of the cases. Finally, there has been no discussion by the moving party regarding the posting of a monthly rental value during any requested stay period. For these reasons, the motion is denied.

**2. M-CV-0060144      Discover Bank vs. Farrell, Charles P.**

As an initial matter, the court denies plaintiff's request for judicial notice. The court, on its own motion, takes judicial notice of the July 24, 2014 minutes regarding plaintiff's motion to deem requests for admissions admitted.

Plaintiff's unopposed motion for judgment on the pleadings is granted pursuant to CCP§438. Judgment is entered in favor of plaintiff in the amount of \$11,205.55.

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**3. M-CV-0060734 Northern Calif. Coll. Serv. Inc. vs. 5128 Entertainment Group**

As an initial matter, the court takes judicial notice of the entire court file. Plaintiff's unopposed motion is granted pursuant to CCP§585(f) and the clerk shall enter default against defendant 5128 Entertainment Group, LLC forthwith. The court vacates the hearing set for November 4, 2014.

**4. M-CV-0061858 Wheels Financial Group, LLC vs. Plank, Terry**

The application for writ of possession is dropped from the calendar as no moving papers were filed with the court.

**5. M-CV-0062020 Bank of New York Mellon v. Dubreville, Marcie O.**

Defendant's Motion to Strike is denied. Defendant shall file and serve her answer or general denial on or before October 14, 2014.

**6. M-CV-0062193 Parkview Edge Properties v. Sears, David**

The appearances of the parties are required for the hearing on defendant's Demurrer. The court notes there is no proof of service in the file showing that the ex parte order advancing the hearing date has been served on defendant. Further, there is no opposition to the demurrer in the file.

**7. S-CV-0029262 Karr, William G. vs. Leep, Inc. et.al.**

Plaintiff's unopposed Motion for Attorney's Fees is granted in its entirety. The trial court has broad discretion to determine the amount of reasonable attorney's fees. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) It is the moving party who has the burden of proving that the claimed hours are reasonable and necessary. (*El Escoial Owners' Assn. v. DLC Plastering* (2007) 154 Cal.App.4th 1337, 1365.) The court has carefully considered and reviewed the moving papers and finds hourly rate and number of hours are reasonable in this case. Plaintiff is awarded \$132,475.00 in attorneys' fees.

**8. S-CV-0030186 Kostiz, Patrick D. vs. Rosene Classics, Inc., et al**

Attorney Clifford B. Scherer's unopposed Motion to be Relieved as Counsel for defendants Rosene Classics, Inc. and Gregory Rosene is granted. Mr. Scherer shall be relieved as counsel of record effective upon the filing of the proof of service of the signed order upon defendants.

**9. S-CV-0030314 Belisle, David, et al vs. Centex Homes, et al**

The three pending motions are continued, on the court's own motion, to October 23, 2014 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

**10. S-CV-0032398            Benedict, Karen vs. Bel Air Mart Inc., et al.**

The motion for summary judgment is dropped from the calendar as no moving papers were filed with the court.

**11. S-CV-0032572            Storey, Rachel, et al vs. City of Roseville**

Plaintiff's motion to compel the deposition of Sargent DeFreece is continued, on the court's own motion, to November 20, 2014 at 8:30 a.m. in Department 40. The parties shall meet and confer in good faith to resolve the issue and provide supplemental briefing on their attempts on or before November 12, 2014.

**12. S-CV-0032640            Owens, Dawn Carol vs. Duncan, Debra Lynn**

Defendant's unopposed Motion for Terminating and Monetary Sanctions is granted in part. Defendant's request is granted as to terminating sanctions as the court finds a misuse and abuse of the discovery process on the part of plaintiff based upon her failure to comply with the June 26, 2014 orders of the court. The case is dismissed without prejudice. Defendant's request for further monetary sanctions is denied in light of granting her request for terminating sanctions.

**13. S-CV-0032712            Bautista, Rochelle, et al vs. Sakic, Amir, et al**

The appearances of the parties are required on the hearing for the two petitions for minor's compromise. The appearances of the minors at the hearing are waived.

**14. S-CV-0032896            Clark, Amy, et al vs. Fry, Tyler David, et al**

Attorney Clifford B. Scherer's unopposed Motion to be Relieved as Counsel for defendant Augustine DeGuzman is granted. Mr. Scherer shall include with the order relieving him as counsel a notice of the upcoming CTC and trial dates. Mr. Scherer shall be relieved as counsel of record effective upon the filing of the proof of service of the signed order upon defendant Augustine DeGuzman.

**15. S-CV-0032934            Amsbaugh, Brian, et al vs. Kaiser Permanente, et al**

The motion to compel deposition is continued to October 16, 2014 at 8:30 a.m. in Department 40 to be heard in conjunction with the related motion to quash.

**16. S-CV-0033186            Duncan, Bruce vs. Nationstar Mortgage, LLC**

The motion for summary judgment is dropped from the calendar. The parties filed a stipulation dismissing the case with prejudice on October 2, 2014.

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**17. S-CV-0033566            Thornton, Robert, et al vs. East West Partners, Inc., et al**

The motion to certify class action is continued, on the court's own motion, to October 23, 2014 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob. The court apologizes to the parties for any inconvenience.

**18. S-CV-0033596            WNC & Associates, Inc., et al vs. Project Go, Inc., et al**

The motion to modify orders regarding appraiser appointment is continued, on the court's own motion, to October 30, 2014 at 8:30 a.m. in Department 40.

**19. S-CV-0034022            Hammons, Darion, et al vs. Dry Creek Joint Ele. School, et al**

Plaintiff's unopposed Motion to Set Aside Dismissal is granted pursuant to CCP§473(b).

**20. S-CV-0034160            Baeseman, Jennifer vs. Kahn & Comings, Inc., et al**

The demurrer to the second amended complaint is continued to November 13, 2014 at 8:30 a.m. in Department 40 at the request of the parties.

**21. S-CV-0034176            Lavy, Marvell vs. Roseville Diamond K, L.P., et al**

The motion to strike is dropped from the calendar. The case was dismissed by the court at the September 16, 2014 OSC re Dismissal hearing.

**22. S-CV-0034296            U.S. Bank, N.A. vs. NNN Parkway Corporate Plaza, LLC, et al**

The demurrer to the first amended cross-complaint is continued, on the court's own motion, to October 16, 2014 at 8:30 a.m. in Department 40 to be heard in conjunction with the other two pending demurrers.

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**23. S-CV-0034396                      Ochsner, David A. vs. Deutsche Bank Nat'l Trust, et al**

Defendant's Motion to Consolidate and/or Stay Unlawful Detainer Proceedings

David Ochsner's Motion to Consolidate and/or Stay Unlawful Detainer Proceedings is denied. As an initial matter, the motion was not served on all parties in both actions as defendant Rachel Tolbert has not been served with the motion. Further, there has been an insufficient showing to warrant consolidation of the cases. Finally, there has been no discussion by the moving party regarding the posting of a monthly rental value during any requested stay period. For these reasons, the motion is denied.

Defendants' Demurrer to the Complaint

Defendants' Demurrer is dropped from the calendar. Plaintiff filed a first amended complaint on October 7, 2014.

**24. S-CV-0034614                      Benkosky, Randy vs. Bank of America, N.A., et al**

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard in Department 43:

Defendants Bank of America and Bank of New York's Demurrer to the First Amended Complaint (FAC)

Ruling on Request for Judicial Notice

Defendants' request for judicial notice is granted pursuant to Evidence Code section 452.

Ruling on Demurrer

Defendants demur to all four causes of action in the FAC. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) It tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) Furthermore, "[a] demurrer based on a statute of limitations is appropriate if the ground appears on the face of the complaint or from matters of which the court may or must take judicial notice." (*Aaronoff v. Martinez-Seftner* (2006) 136 Cal.App.4th 910, 918.) The FAC is reviewed keeping these principles in mind.

The first cause of action alleges a claim for negligent misrepresentation, which is insufficiently pled in the FAC. First, a negligent misrepresentation action has a two-year statute of limitations. (CCP§339.) The FAC alleges, in conclusory fashion and without

identifying a specific date, that the misrepresentations took place sometime in 2012. (FAC ¶¶21, 28.) The original complaint was filed on April 24, 2014. As currently pled, the first cause of action may be barred by the statute of limitations and there are insufficient allegations of delayed discovery, which would extend the statute of limitations. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal. 4th 797, 808.)

Moreover, the negligent misrepresentation action is insufficiently pled. “ ‘The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.’ [Citations omitted.] While there is some conflict in the case law discussing the precise degree of particularity required in the pleading of a claim for negligent misrepresentation, there is a consensus that the causal elements, particularly the allegations of reliance, must be specifically pleaded. [Citations omitted.]” (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 50.) In reviewing the FAC, plaintiff merely states general, conclusory allegations that lack the level of specificity required for a negligent misrepresentation cause of action. Thus, the first cause of action fails.

The second cause of action states a claim for intentional misrepresentation. A fraud action requires a plaintiff prove: “(1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and, (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. Each element in a cause of action for fraud must be factually and specifically alleged. In a fraud claim against a corporation, a plaintiff must allege the names of the persons who made the misrepresentations, their authority to speak for the corporation, to whom they spoke, what they said or wrote, and when it was said or written.” (*Perlas v. GMAC Mortg., LLC* (2010) 187 Cal.App.4th 429, 434.) Despite the fact that both defendants are corporate entities, the allegations in the FAC lack any level of specificity. They are not tailored to address either defendant and make only general references. The demurrer is properly sustained as to intentional misrepresentation action.

Plaintiff alleges breach of contract in the third cause of action. To prevail in an action for breach of contract, plaintiff must show: (1) the existence of a contract between the parties; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's failure to perform (breach); and (4) resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) The essential elements of contract formation are parties capable of contracting, consent, a lawful object, and consideration. (Civil C§1550.) Here, plaintiff has not sufficiently alleged factual allegations demonstrating a contractual relationship with defendants. Nor have they alleged sufficient facts establishing a breach on the part of the defendants. Thus, the third cause of action also fails.

The final cause of action seeks declaratory relief. An action for declaratory relief requires an actual controversy relating to the legal rights and duties of the parties. (CCP§1060.) The FAC is based upon allegations that the transfer of the deed of trust is void under New York law, which creates an actual controversy regarding the duties, rights, obligations, and title to impose an interest on the property. (FAC ¶¶36-47.) These allegations are insufficient to allege declaratory relief since plaintiffs lack standing to challenge the transfer. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020, 1029-1034.) Moreover, there are insufficient allegations to sufficiently establish an actual controversy from any alleged improper assignment to show an interference with plaintiff's ability to pay on the obligation under the deed of trust. For all of these reasons, the demurrer is sustained.

The last area to address is leave to amend. As it pertains to the causes of action addressed in the demurrer, plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) A demurrer will be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Plaintiff does little to address the deficiencies in his opposition. Nonetheless, a review of the FAC does lend itself to the possibility that the deficiencies in the first, second, and third causes of action may be cured with an amendment. The same is not true for the fourth cause of action, since plaintiff has no standing to challenge the transfer of the deed of trust. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020.) Therefore, the demurrer is sustained with leave to amend as to the first, second, and third causes of action. The demurrer is sustained without leave to amend as to the fourth cause of action.

The remaining request for leave to amend is made by plaintiff in his opposition. Specifically, plaintiff requests leave to add new theories to the FAC. This request is beyond the scope of the demurrer and improper to grant absent a properly noticed motion. For these reasons, plaintiff's request for leave to amend in order to add new legal theories is denied.

Plaintiff shall file and serve his third amended complaint on or before October 17, 2014. To reiterate, plaintiff is granted leave to amend only the first cause of action for negligent misrepresentation, second cause of action for intentional misrepresentation, and third cause of action for breach of contract.

Defendants Resurgent Capital Services and New Penn Financial LLC's Demurrer to the First Amended Complaint (FAC)

Defendants demur to the third and fourth causes of action. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) It tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are

assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) The FAC is reviewed keeping these principles in mind.

Plaintiff alleges breach of contract in the third cause of action. To prevail in an action for breach of contract, plaintiff must show: (1) the existence of a contract between the parties; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's failure to perform (breach); and (4) resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) The essential elements of contract formation are parties capable of contracting, consent, a lawful object, and consideration. (Civil C§1550.) Here, plaintiff has not sufficiently alleged factual allegations demonstrating any of the elements for a breach of contract claim. Thus, the third cause of action fails.

The fourth cause of action seeks declaratory relief. An action for declaratory relief requires an actual controversy relating to the legal rights and duties of the parties. (CCP§1060.) The FAC is based upon allegations that the transfer of the deed of trust is void under New York law, which creates an actual controversy regarding the duties, rights, obligations, and title to impose an interest on the property. (FAC ¶¶36-47.) These allegations are insufficient to allege declaratory relief since plaintiffs lack standing to challenge the transfer. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020, 1029-1034.) Moreover, there are insufficient allegations to sufficiently establish an actual controversy from any alleged improper assignment to show an interference with plaintiff's ability to pay on the obligation under the deed of trust. For all of these reasons, the demurrer is sustained.

As to the issue of leave to amend, plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) A demurrer will be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Plaintiff does little to address the deficiencies in his opposition. Nonetheless, a review of the FAC does lend itself to the possibility that the deficiencies in the third cause of action may be cured with an amendment. The same is not true for the fourth cause of action, since plaintiff has no standing to challenge the transfer of the deed of trust. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020.) Therefore, the demurrer is sustained with leave to amend as to the third cause of action. The demurrer is sustained without leave to amend as to the fourth cause of action.

Plaintiff shall file and serve his third amended complaint on or before October 17, 2014.

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**25. S-CV-0034778                      Shaw, John Eric vs. Calif. Dept. of Justice**

As an initial matter, the court grants petitioner's request for judicial notice pursuant to Evidence Code section 452. The petition for writ of mandate is denied. While petitioner has sufficiently established a basis for relief from mandatory registration, he has failed to sufficiently establish a basis for relief from discretionary registration. As pointed out by petitioner, in considering discretionary registration, the court must consider the likelihood that defendant will commit the offense in the future. (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70.) Petitioner, however, presents argument rather than documentary evidence to support his writ petition. The court noted when the matter was continued on September 11, 2014, that the writ petition was not verified and afforded petitioner the opportunity to submit further documentary evidence. The only additional document submitted was a request for judicial notice. As previously noted by the court, the writ petition is not verified so the court is unable to accept as true the matters stated in paragraph 6. Further, there is no declaration submitted by petitioner to support the factual allegations or arguments that he will not commit the offense in the future. The absence of documentary evidence to support the request, despite petitioner being afforded an opportunity to present such documents, leaves the court with an incomplete basis to grant the writ petition. For these reasons, the petition for writ of mandate is denied.

**26. S-CV-0034804                      Berberich, James, et al vs. Berberich, Joyce G., et al**

The demurrer and motion to strike are continued, on the court's own motion, to October 30, 2014 at 8:30 a.m. in Department 40.

**27. S-CV-0035086                      Bradbury, Megan, et al - In Re the Petition of**

The petition for minor's compromise is continued to October 30, 2014 at 8:30 a.m. in Department 40 at the request of the moving party.

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